Supreme Court, U.S.
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No. 93-2018

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF KANSAS, *et al.*,
Petitioners
v.
UNITED STATES OF AMERICA, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.

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QUESTION PRESENTED

Whether the Wright Amendment, which regulates interstate air service to and from Love Field Airport in Dallas, Texas, violates Petitioners' constitutional rights under the Port Preference Clause or to freedom of speech or interstate travel.

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BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.[1]

STATEMENT

The central issue before this Court is whether the potential, minor inconveniences that a commercial airline passenger may experience by choosing to fly to or from the Dallas/Fort Worth metroplex via Love Field, rather than DFW Airport, render the Wright Amendment unconstitutional. The Court of Appeals' rejection of Petitioners' constitutional challenge to the Wright Amendment is consistent with the decisions of this Court, and not in conflict with decisions of other circuits. Furthermore, the Petition does not present an important question of federal law which should be settled by this Court.

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[1] Respondent American Airlines, Inc. ("American") confirms the description of its affiliated companies set forth in the Petition.

Two circuit courts and three district courts (including the courts below) have resoundingly upheld the Wright Amendment against constitutional challenges *identical* to those raised by Petitioners. Undaunted by the numerous opinions rejecting their arguments, Petitioners now seek to reargue these claims before this Court, which has twice denied Petitions for a Writ of Certiorari raising *identical* issues.

A. The Court of Appeals' Decision Conforms to Prior Decisions Upholding the Constitutionality of the Wright Amendment

"The Wright Amendment has been challenged before and has survived." *State of Kansas v. United States*, 797 F. Supp. 1042, 1045 (D.D.C. 1992). (Pet. App. 20a.) Both the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of California have already determined that Petitioners' claims are without merit in suits filed by Petitioners' Counsel, David J. Gallo, Esq. *See Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 298 (1991), *following remand, aff'd sub nom., Cramer v. Card*, 983 F.2d 232 (5th Cir. 1993), *cert. denied, sub nom., Cramer v. Peña*, —— U.S. ——, 113 S. Ct. 2994 (1993) (hereinafter "*Cramer*"); *and Zamutt v. Skinner, et al.*, Civil Action No. 90-0602-B(M) (S.D. Cal. 1990) (hereinafter "*Zamutt*").[2]

1. Cramer v. Skinner *and Related Opinions*

As in the Petition before this Court, the appellant in *Cramer* argued that the Wright Amendment is unconstitutional because it allegedly violates the First Amendment, the implied constitutional right to travel, and the Port Preference Clause. In *Cramer*, the Fifth Circuit concluded

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[2] For the convenience of the Court, a true and correct copy of the Order of the District Court in *Zamutt* dated December 6, 1990 is included in the Appendix to this Brief.

that the Wright Amendment was constitutional, in part because the appellant's claimed injuries were merely minor inconveniences that attended the appellant's preferred choice of travel, and that such:

> Minor restrictions on travel simply do not amount to the denial of a fundamental right that can be upheld only if the government has a compelling justification. . . . Cramer remains free to travel unrestricted to points outside the Love Field service area from Dallas by using DFW, or he can take a second flight from a point within the Love Field service area. The [Wright A]mendment does not deter Cramer from travelling by air . . . .

Cramer, 931 F.2d at 1031.

The Fifth Circuit in *Cramer* ultimately ruled that the district court properly denied the plaintiff's motion for summary judgment, and was prepared to "order judgment on the merits for the Government." *Cramer*, 931 F.2d at 1035. However, because the government had not cross-appealed from the district court's failure to grant the government's motion for summary judgment, the Fifth Circuit remanded the case to the district court "with instructions . . . to consider the government's motion for summary judgment and for further proceedings consistent with this opinion." *Cramer*, 931 F.2d 1020 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 298 (1991). The district court, in an unpublished opinion, granted summary judgment in favor of the government. Upon the subsequent appeal from the grant of summary judgment, the Fifth Circuit affirmed without further opinion, and this Court denied certiorari. *Cramer v. Card*, 983 F.2d 232 (5th Cir. 1993), *cert. denied, sub nom., Cramer v. Peña*, —— U.S. ——, 113 S. Ct. 2994 (1993).

2. Zamutt v. Skinner

Zamutt was dismissed on both a jurisdictional basis (lack of standing) and on the merits. The court con-

cluded, *inter alia*, that the Wright Amendment "does not deprive Plaintiff of her First Amendment right to hear [commercial speech] or her fundamental right of interstate travel." (Amer. App. 2a.) The *Zamutt* court also granted summary judgment in favor of the defendants on the grounds that the Wright Amendment does not violate the Port Preference Clause.[3] (Amer. App. 2a.)

3. *Cases Upholding Airport Regulations Similar to the Wright Amendment*

The cases upholding the constitutionality of the Wright Amendment are in accord with opinions upholding the constitutionality of regulations that restrict the use of designated airports in cities with multiple airports.

In *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184 (5th Cir. 1982), the Fifth Circuit upheld the constitutionality of a federal regulation that prohibits nonstop service to or from Washington National Airport and any airport beyond a thousand-mile perimeter. Similarly, in *Western Air Lines, Inc. v. Port Authority*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), the Second Circuit upheld the constitutionality of a local "perimeter" regulation that restricts flights to or from New York's La Guardia Airport.

B. Statement of Facts

An understanding of the background of the Wright Amendment is necessary to an examination of the issues presented by the Petition.

1. *The Wright Amendment Does Not Interfere With the Right to Travel to and From the Metroplex*

The Dallas-Fort Worth International Airport ("DFW" or "DFW Airport") is the primary airport in the Dallas-Fort Worth metropolitan area (the "Metroplex") and the

[3] No appeal was taken from the decision of the District Court in *Zamutt*.

second busiest airport in the United States. It is located 18 miles from the center of Dallas. Love Field, Dallas' short haul airport, is six miles from the center of Dallas, and is *merely twelve miles* from DFW.[4]

2. *The Wright Amendment Serves the Government's Interests in Apportioning Air Travel Resources and Resolving a Longstanding Dispute Between Dallas and Forth Worth*

Love Field was built and operated by the City of Dallas as its airport at a time when Fort Worth, whose center is 31 miles from the center of Dallas, also had its own airport. For many years these two cities bitterly disputed the issue of which city should have the primary airport for the Metroplex. The two cities' operation of separate and competing airports created substantial expenses for the carriers serving the area and impaired the quality of the area's airline services. *State of Kansas*, 797 F. Supp. at 1044-45 (Pet. App. 18a-20a).

In the late 1960's the two cities agreed to end their decades of rivalry and resolve their dispute by pooling resources and building a new airport, DFW Airport, and by consolidating the area's airline services at that airport. To that end, each city agreed to phase out scheduled commercial services from its respective local airports and agreed to refrain from any acts or policies competitive with DFW. Without these commitments, DFW would never have been built, and the commitments remain in force and effect today.

Southwest Airlines, which was not at that time a Civil Aeronautics Board ("CAB") certificated carrier, refused to move to DFW, but was permitted to continue to provide intrastate air travel services from Love Field. *City*

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[4] American's factual recitation is undisputed by Petitioners and supported by the Affidavit of Melvin F. Olsen, Vice President—Capacity Planning for American, contained in the record as Exhibit I" to American's Statement of Material Facts in Support of its Summary Judgment Brief to the District Court.

of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 194 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1975) (holding that, under Texas law, the contract between Dallas and Fort Worth could not prevent an intrastate carrier licensed by the now defunct Texas Aeronautical Commission from serving Love Field). After deregulation of the airline industry in 1978, Southwest was authorized by CAB to implement interstate services from Love Field to New Orleans, *Southwest Airlines Automatic Entry Investigation*, CAB Order 79-9-192 (September 28, 1979), thus raising once again the commitment of the cities to move all interstate services in the Metroplex to DFW.

Many constituencies in the Metroplex clamored for either the elimination of all commercial air services from Love Field or the restriction of Love Field to intrastate flights. These parties included the City of Fort Worth (which had closed its own airport in fulfillment of its commitment to DFW), numerous airlines (which vacated Love Field and constructed new facilities at DFW), and neighborhood groups from the Love Field area (which relocated to or remained in the area based upon representations that airline service at Love Field would be curtailed or eliminated). Other groups (including the special interest group supporting Petitioners) sought to abrogate all restrictions on the use of Love Field.

3. *The Wright Amendment Embodies a Legitimate Legislative Policy and Furthers Significant Government Interests*

In 1980, Congress enacted Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (Pet. App. 2a-3a), commonly known as the Wright Amendment. The Wright Amendment was enacted to "provide[] a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years." H.R. Rep. No. 96-716, 96th Cong., 1st Sess. 24 (1979). The Wright Amend-

ment reflects Congress' legitimate policy interest in furthering improved air service to the Metroplex by subordinating Love Field to DFW Airport. This legislative compromise was agreed to by "Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW Airport authority, and related constituent groups." *Id.*

4. *Invalidation of the Wright Amendment Will Damage DFW and Create More Travel Inconveniences Than it Alleviates*

As a hub airport, DFW operates on the fundamental principle of combining demand for air transportation to and from the hub city with demand for flights between cities in all directions around DFW. Connecting passengers using the hub "subsidize" a level and diversity of air service which the Metroplex itself could not sustain. Because the Wright Amendment enables American and Delta Air Lines, Inc. to concentrate their flights at a hub, Metroplex residents and the travelling public benefit from nonstop service to over 140 destinations worldwide.

Revoking the Wright Amendment would cause substantial damage to DFW and to its ability to serve as an engine driving the economy of North Central Texas. If the geographic scope of permissible service from Love Field were expanded, American and other DFW carriers would be forced to split their operations between DFW and Love Field to remain competitive in the local Dallas market. As services were shifted from DFW to Love Field, DFW would lose a substantial portion of the feed traffic which today supports the current superior level of service. Paradoxically, expanding service at Love Field would cause an overall decline in the level and scope of air service for the region.

SUMMARY OF ARGUMENT

I. Original Jurisdiction

This Court has invoked its original jurisdiction sparingly, particularly where, as here, a suitable alternative forum is available. It is extremely unlikely that this Court would have accepted original jurisdiction in this case. Moreover, because Petitioners chose to eschew the assertion of original jurisdiction, there is no reason or precedent for this Court to give special consideration to the Petition.

II. Port Preference Clause

The Wright Amendment does not violate the Port Preference Clause, which, as interpreted by the courts, has been rendered virtually a historical nullity. The effects of the Wright Amendment fall squarely within both of the recognized exceptions to the Port Preference Clause; they are incident to a legitimate congressional regulation of commerce; and result more from an accident of geography than from an intentional government preference.

III. Commercial Speech

The restrictions imposed by the Wright Amendment do not violate the First Amendment protection of truthful commercial speech. To the extent that the Wright Amendment prohibits the dissemination of misleading information implying that air carriers may lawfully provide through service from Love Field to places beyond the geographical limits imposed by the Wright Amendment, it does not affect truthful commercial speech and does not implicate the First Amendment. To the extent that the Wright Amendment does impose restrictions on truthful commercial speech, it satisfies the three-part *Central Hudson* test.

The Court of Appeals correctly refused to apply heightened scrutiny to the Wright Amendment's regulation of

commercial speech because its restrictions do not impinge upon any constitutionally protected activity of Petitioners.

IV. Right of Interstate Travel

The Wright Amendment does not violate Petitioners' constitutional right to travel. It operates as a trivial, inconsequential impediment to interstate travel. Petitioners' argument reduces to a feeble claim for a constitutional right to the most convenient form of travel. Moreover, passengers who choose to travel to and from places outside the Love Field service area via Love Field, rather than DFW Airport, are not classified by the Wright Amendment in such a way as to impringe upon constitutionally protected rights. Thus, the Wright Amendment does not violate the Due Process Clause of the Fifth Amendment.

The Petition should be denied.

ARGUMENT

I. THERE IS NO BASIS FOR THE NOVEL THEORY THAT SPECIAL CONSIDERATION BE GIVEN TO PETITIONS FOR A WRIT OF CERTIORARI IN ORIGINAL JURISDICTION CASES

Original jurisdiction would not have been exercised in this case. It has long been the philosophy of this Court that its original jurisdiction should be invoked sparingly. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *United States v. Nevada*, 412 U.S. 534, 537-8 (1973); *Utah v. United States*, 394 U.S. 89 (1969). "Indeed, Chief Justice Fuller wrote nearly a century ago that [the Supreme Court's] original 'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.' " *Mississippi v. Louisiana*, —— U.S. ——, 113 S. Ct. 549, 552 (1992), quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). This Court is "particularly reluctant

to take original jurisdiction of a suit where the plaintiff has another adequate forum . . . ." *United States v. Nevada*, 412 U.S. at 537-538.

Determining whether a case is appropriate for original jurisdiction involves an examination of two factors. First, this Court looks to the nature of the interest of the complaining state, focusing on the seriousness and dignity of the claim. Secondly, it explores the availability of an alternative forum. *Mississippi v. Louisiana*, 113 S. Ct. at 552-553.

In this case, the availability of a suitable alternative forum is self-evident from the proceedings below. Furthermore, the alleged injury suffered by the State of Kansas is not sufficiently serious for this Court to have taken original jurisdiction. The Court of Appeals held that the State of Kansas had very limited standing to sue, a determination that Petitioners have not challenged in this Court. *State of Kansas v. United States of America*, 16 F.3d 436, 439 (D.C. Cir. 1994) (citations omitted). (Pet. App. 5a.)

In short, the seriousness and dignity of the claim of the State of Kansas as an employer, which would occasionally send its employees by air to Dallas, does not rise to the threshold that would have justified Petitioners' seeking to invoke the original jurisdiction of this Court. Moreover, there is no reason and certainly no precedent for the suggestion that this Court should treat this Petition with special consideration, as the Petitioners eschewed any attempt to assert original jurisdiction.

II. THE WRIGHT AMENDMENT DOES NOT VIOLATE THE PORT PREFERENCE CLAUSE

A. The Port Preference Clause Is a Narrow Exception to Congress' Power to Regulate Commerce

In the forefront of their attack on the Wright Amendment, Petitioners rely on an obscure provision of the Con-

stitution aptly described by the District Court as "almost a historical nullity." *State of Kansas*, 797 F. Supp. at 1048. (Pet. App. 27a.) The District Court recognized that:

> The [Port Preference] Clause has been interpreted only rarely over the last two hundred years, but the limited existing jurisprudence indicates that it operates as a narrow exception to Congress' power to regulate commerce.

Id. at 1048. (Pet. App. 27a.)

The purpose of the Port Preference Clause was to give small states protection against attempts by the more powerful states deliberately to discriminate against them. *City of Houston*, 679 F.2d at 1198. The District Court below noted the limited viability of the Clause:

> The Port Preference Clause has been construed so narrowly that we think only a statute that required all planes leaving or entering Texas to first land in one of the contiguous states would violate the Port Preference Clause.

797 F. Supp. at 1051, n.12. (Pet. App. 32a.)

In denying Petitioners' Port Preference Clause arguments, the Court of Appeals summed up the reason for the paucity of authority by observing that "[the Port Preference Clause] has simply not yet been seriously impinged upon." *State of Kansas*, 16 F.3d at 439. (Pet. App. 6a.) This statement was made by the Court of Appeals after consideration of the prior unsuccessful challenges to the constitutionality of the Wright Amendment made by parties represented by Counsel for the Petitioners in a "virtually identical" lawsuit, *Cramer*, 931 F.2d 1020, *cert. denied*, 112 S. Ct. 298 (1991). *State of Kansas*, 16 F.3d at 439.

Nevertheless, while failing to draw the attention of this Court to either the foregoing decisions or the other pertinent Port Preference Clause decision of the Fifth Circuit

(*City of Houston*, 679 F.2d 1184), Petitioners would have this Court accept the argument that air travellers have a constitutional claim because of the minor inconveniences [5] encountered by virtue of their choosing to embark or disembark at Love Field rather than DFW Airport.

B. Recognized Exceptions to the Port Preference Clause Validate the Wright Amendment

In determining whether a statute violates the Port Preference Clause, courts recognize two broad exceptions that validate statutes that might seemingly violate the Clause:

> Government actions do not violate the Clause even if they result in some detriment to the port of a state, where they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference.

City of Houston, 679 F.2d at 1197. In *Cramer*, the Fifth Circuit, like the District Court below, held that the Wright Amendment meets the criteria of both exceptions. *Cramer*, 931 F.2d at 1032.[6]

1. *The Wright Amendment Is Incident to a Legitimate Regulation of Commerce*

The Fifth Circuit in *Cramer* held that "Congress did not decide to cut back service at Love Field, as Cramer assumes, for no reason. Congress enacted the [Wright] Amendment incident to its legitimate regulation of interstate airline service and pursuant to its rational decision

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[5] Petitioners describe these inconveniences as *heavy burdens* (Pet. 4), but this description has not met with judicial acceptance in any of the decisions in which the constitutionality of the Wright Amendment has been challenged.

[6] The Court of Appeals determined that the Wright Amendment satisfied the first criteria, but not the second. *State of Kansas*, 16 F.3d at 441 n.4 (Pet. App. 9a).

to maintain the agreement between Dallas and Fort Worth." *Id.* 931 F.2d at 1032.

The Court of Appeals in this proceeding properly analyzed the alleged benefit to air travellers from the states contiguous with Texas as being an insignificant, incidental result of:

> the very substantial and undeniably legal preference bestowed on DFW as against Love Field. The Supreme Court, long ago, recognized that the Clause does not bar "incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its powers."

State of Kansas, 16 F.3d at 440-441, quoting *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 439 (18 How) (1856). (Pet. App. 8a-9a.) "Congress may enact laws which 'greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring states.' " *Alabama Great Southern Ry. v. United States*, 340 U.S. 216, 229 (1951), quoting *Louisiana Public Service Comm'n v. Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931). Thus, the Wright Amendment falls within the first exception to the application of the Port Preference Clause.

2. *The Wright Amendment's State Restrictions Result from an "Accident of Geography"*

Courts have long held that a port preference that results as a matter of geography does not violate the Port Preference Clause. *Alabama Great Southern Ry. v. United States*, 340 U.S. 216. In *City of Houston*, the plaintiffs attacked under the Port Preference Clause regulations of the Department of Transportation and the Federal Aviation Administration that impose a "perimeter rule" on the Washington National Airport. The perimeter rule prohibits air carriers from operating non-stop flights between Washington National and any airport more than

a thousand miles away. By restricting long haul flights to Washington National, the perimeter rule protects Washington's Dulles International Airport, preserves National's short haul status, and controls the increasing traffic at Washington National. *City of Houston,* 679 F.2d at 1188, 1191.

The Fifth Circuit in *City of Houston* held that the perimeter rule did not violate the Port Preference Clause because any discrimination against western states as a result of the perimeter rule was an "accident of geography," and not the result of deliberate discrimination against a named state or states. *Id.* at 1198. Similarly, the District Court below determined that the analysis applicable to perimeter rules applies equally to the Wright Amendment's restrictions:

> The use of political boundaries in lieu of geographical ones does not, without more, turn an otherwise permissible "accident of geography" into an impermissible use of state power. This would be elevating form over substance.

State of Kansas, 797 F. Supp. at 1051. (Pet. App. 32a.)

C. The Wright Amendment Does Not Impermissibly Prefer the Ports of One State Over Those of Another

As the Fifth Circuit recognized in *Cramer*, the instant case falls squarely within the holding of *City of Houston.* In *Cramer*, the appellant (like Petitioners here) attempted to distinguish the Wright Amendment from the perimeter rule by arguing that the latter was facially neutral because it did not discriminate against a named state or states and, thus, any effect on air travel resulting from the perimeter rule was incidental and due to geographic reasons. *Cramer*, 931 F.2d at 1030-31. Under Petitioners' reasoning, the Wright Amendment would not violate the Port Preference Clause if the restrictions were defined in terms of distance even though that definition encompassed the very same states that are named and about

which Petitioners now complain. The Fifth Circuit rejected this contention:

> [W]e reject Cramer's assertion that the use of state borders for definitional purposes violates the Constitution.

Id. Any preference given to the states which happen to be contiguous with Texas by virtue of the short haul status imposed upon Love Field is merely incidental to the legitimate governmental act of regulating air transportation, and ultimately of minimal significance. "The Wright Amendment does not require that all flights from Kansas to Texas first stop in one of the four contiguous states; it only conditions those heading to or leaving from Love Field. Nothing is stopping flights from Kansas flying directly to DFW, only a few miles from Love Field." *State of Kansas*, 797 F. Supp. at 1051. (Pet. App. 32a.)

D. The Wright Amendment Does Not Violate the Second Sub-part of the Port Preference Clause

Petitioners argue that the two sub-clauses of the Port Preference Clause have different effects. However, the Fifth Circuit's analysis of the Port Preference Clause in *City of Houston* is plainly applicable to both sub-clauses. Although the prohibition against preferring one state over another appears to be facially absolute, its application has been significantly restricted by judicial interpretation.

Petitioners attack the clear logic of the determination of the Court of Appeals that the Wright Amendment does not literally violate the Port Preference Clause by claiming that the Wright Amendment operates asymmetrically on aircraft depending upon the direction in which they happen to be flying. While the Court of Appeals, in explaining its reasons for rejecting Petitioners' argument, dealt explicitly with the example of an aircraft travelling to Dallas from a "non-service area state," the logic applies equally to aircraft travelling in the other direction. The Wright Amendment prohibits air carriers from pro-

viding through service from Love Field to airports outside the Love Field service area. Accordingly, an air passenger who chooses to travel from Love Field to such an airport must at some intermediate point part company with the aircraft boarded at Love Field. The intermediate point at which the aircraft and the passenger must part company in order to avoid violation of the Wright Amendment could be any other airport within Texas.[7] Thus, the Port Preference Clause is not violated by the Wright Amendment.

This interpretation of the effect of the Port Preference Clause does not strain logic, as Petitioners suggest (Pet. 17). The Port Preference Clause is violated only if a vessel is *obliged* to "enter, clear, or pay duties" in a state other than that to which or from which it is bound. An aircraft leaving from Love Field is not *obliged* by the Wright Amendment to land in a state other than Texas before it or its disembarked passengers may continue travel to states located outside the Love Field service area: it may land anywhere in Texas to discharge its passengers who may then fly directly to such states.

Furthermore, Petitioners' idiosyncratic definitions of the terms "enter," "clear" and "pay duties" are supported neither by authority nor good sense. The Court of Appeals was correct in attributing a technical meaning to these terms. *State of Kansas*, 16 F.3d at 440. (Pet. App. 7a.)

Moreover, and more fundamentally, the Wright Amendment does not require aircraft *generally* bound to or from Texas to enter, clear, or pay duties in another state. The Wright Amendment does not affect any aircraft other than those leaving from or arriving at Love Field.

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[7] It is clear from the language and syntax of the second sub-clause of the Port Preference Clause that the other state referred to therein is intended to be a third state other than those from which and to which the vessel is bound. In the above hypothetical, no state other than the departure and destination states is involved.

This trivial effect on interstate air transportation emanating from one airport in the Dallas-Fort Worth area, located a mere 12 miles from DFW Airport, can hardly be elevated rationally to the level of a violation of the Port Preference Clause.

III. THE WRIGHT AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT OF FREE SPEECH

Petitioners contend that the Wright Amendment, as interpreted by the DOT, permits carriers to provide information about, and sell, transportation from Love Field to points other than Texas, New Mexico, Oklahoma, Arkansas, and Louisiana upon request, but prohibits the carriers (and travel agents) from advertising or offering such information and service absent request. This prohibition, Petitioners contend, violates the First Amendment because such advertising or offering is protected commercial speech.

A. The Wright Amendment's Restriction Does Not Affect Truthful Commercial Speech

Although the District Court and Court of Appeals in this case and in *Cramer* assumed that the Wright Amendment restricts the dissemination of truthful commercial speech that concerns a lawful activity, a precise analysis of the commercial speech restriction reveals that the statements restricted by the Amendment concern *unlawful* activity.

The Wright Amendment renders unlawful through service to or from Love Field and any point beyond its direct service area. Subsection (a) of the Amendment requires incorporation of this operating limitation into the operating permit of every air carrier. The Wright Amendment's restriction on commercial speech states that "no person shall . . . offer to provide" such unlawful through service. International Air Transportation Competition Act 1979, § 29(b). (Pet. App. 2a-3a.)

The unsolicited promotion of double ticketing falsely implies that the air carrier may lawfully provide through service. Commercial speech is not entitled to any First Amendment protection unless "it concerns a lawful activity and is not misleading or fraudulent." *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico.*, 478 U.S. 328, 340 (1986). Because Petitioners do not have a First Amendment right to make misleading statements that concern service prohibited by the Wright Amendment, the sales and solicitations rights that Petitioners seek are not "protected commercial speech."

B. Petitioners' Arguments Have Been Heard and Rejected in Prior Decisions

In *Cramer*, the Fifth Circuit applied a protected commercial speech analysis to the exact same speech restrictions at issue in this appeal. The Fifth Circuit held that speech regarding the sale of airline tickets to or from Love Field is "commercial speech" which, assuming that the speech is truthful and concerns a lawful activity, is entitled to some First Amendment protection. *Cramer*, 931 F.2d at 1033. *Cramer* found that the Wright Amendment's restrictions satisfied each prong of the test applicable to protected commercial speech: (1) that the government's interest in restricting this speech be substantial; (2) that the restrictions directly advance the government's interest; and (3) that the restrictions provide a reasonable fit in serving the interest. *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505, 1510 (1993); *Cramer*, 931 F.2d at 1034-1035.

C. The Courts Below Properly Applied the *Central Hudson* Test

Like the Fifth Circuit in *Cramer*, the District Court and Court of Appeals applied the three-part *Central Hudson* test and determined that the Wright Amendment satisfies each prong of that test. *State of Kansas*, 797 F. Supp. at 1053, 1054. (Pet. App. 37a-38a.) Indeed, the Court

of Appeals concluded that the second and third prongs of the test are rather obviously satisfied in this case. *State of Kansas*, 16 F.3d at 442-443. (Pet. App. 13a.)

1. *The Wright Amendment Satisfies the Substantial Interest Criterion*

"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 477 U.S. 557, 563 (1980). The Fifth Circuit in *Cramer*, the Court of Appeals and the District Court all concluded that the governmental interest served by the Wright Amendment is a "substantial" interest for purposes of the *Central Hudson* analysis:

> Congress had a substantial interest in resolving the dispute between Dallas and Fort Worth, *a controversy that had long hindered efforts to improve airline service for the Dallas-Fort Worth area.*

Cramer, 931 F.2d at 1034 (emphasis added). The Court of Appeals concluded that it was impossible to question the substantiality of the government's interest in the case, namely "ensuring adequate facilities for interstate air travel in the Dallas-Fort Worth area." *State of Kansas*, 16 F.3d at 443. (Pet. App. 15a.)

2. *The Wright Amendment Satisfies the Direct Advancement Criterion*

The Court of Appeals and the District Court held that the restrictions imposed by the Wright Amendment directly advance the government's interests: "The Wright Amendment directly advances the interest asserted by reducing demand for air travel from Love Field." *State of Kansas*, 797 F. Supp. at 1053. (Pet. App. 38a.) The Court of Appeals stated:

> The advertising ban advances the asserted governmental interest—to settle a regional dispute by pre-

> ferring DFW over Love Field—only too well in appellants' eyes: The restrictions reduce the demand for Love Field and thereby strengthen DFW.

State of Kansas, 16 F.3d at 443 (Pet. App. 13a.); *cf.*, *Posadas*, 478 U.S. at 341 (upholding ban that results in the "reduction of demand for casino gambling").

3. *The Wright Amendment Satisfies the Reasonable Fit Criterion*

The minor restrictions on commercial speech imposed by the Wright Amendment reasonably fit the government's interests. The restrictions do not impose a total ban on providing information regarding "double ticketing"; rather, the restrictions permit truthful responses to inquiries from travellers, and merely prevent air carriers or their agents from actively soliciting business that would serve to undermine the effect of the Wright Amendment. At the same time, the restrictions encourage many passengers to use DFW Airport rather than Love Field for long haul travel.

The Court of Appeals found a "reasonable fit" between the restrictions and the government's interests, recognizing that:

> A permissible regulation "employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* The Department's interpretation of the statute, while prohibiting advertising of service between Love Field and points outside the service area, permits airlines and their travel agents to provide service schedules and prices (to facilitate "double-ticketing" arrangements) to customers who specifically ask for them. The advertising ban thus is narrowly tailored to be "in proportion to the interest served."

State of Kansas, 16 F.3d at 443, quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). (Pet. App. 13a-14a.) *See also State of Kansas*, 797 F. Supp. at 1053-1054. (Pet. App. 38a.)

4. *Petitioners Misconstrue the Reasonable Fit Criterion*

Petitioners betray a misunderstanding of what this Court requires by the "reasonable fit" test in complaining that the Court of Appeals erred in failing to consider the availability of alternative means of serving the government's interest. Contrary to Petitioners' contention, the availability of allegedly less intrusive means does not render the Wright Amendment's restrictions unconstitutional. *Board of Trustees*, 492 U.S. at 480. The *Board of Trustees* opinion does not hold that if a restriction that does not involve regulation of speech is available, a restriction of commercial speech is per se unconstitutional: "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* (emphasis added).[8]

D. The Court of Appeals Correctly Refused to Apply Heightened Scrutiny to the Wright Amendment's Regulation of Commercial Speech

Petitioners' contention that the government must demonstrate that the Wright Amendment's regulation of commercial speech is necessary to promote a compelling governmental interest is erroneous. At most, the communications restricted by the Wright Amendment constitute ordinary commercial speech. No authority exists to support Petitioners' argument that restrictions on such speech

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[8] Petitioners contend that the government's interest in the Wright Amendment no longer exists. They support this argument by an improper and highly selective reference to a report which Petitioners have suggestively dubbed the "Secret Report." This report is *not* part of the evidentiary record in this case. The Court of Appeals denied Petitioners' request that it take judicial notice of the contents of the report and Petitioners have not challenged that denial. There is no justification for Petitioners to make reference to that report as if it were evidence in this case. Moreover, as the Respondents fully briefed in the court below, Petitioners' characterization of the report is inaccurate and misleading, and the report does not support Petitioners' constitutional claims.

warrant "heightened scrutiny." As this Court explained very recently in a commercial speech case: "We have rejected the 'least-restrictive means' test for judging restrictions on commercial speech." *City of Cincinnati*, 113 S. Ct. at 1510 n.13.

1. *The Wright Amendment's Commercial Speech Restrictions Do Not Curtail Constitutionally Protected Activity*

Given the availability of comprehensive airline service from DFW Airport, the use of Love Field as the terminus for interstate air travel is not a constitutionally protected right. Petitioners do not have a constitutional right to the most convenient form of travel, and minor travel restrictions do not even implicate the fundamental right of travel. *Cramer*, 931 F.2d at 1031; *City of Houston*, 679 F.2d at 1198; *State of Kansas*, 16 F.3d at 442 n.6. (Pet. App. 13.) ("We therefore need not depart from *Central Hudson* since the advertising restrictions do not impinge upon a constitutionally protected activity.")

Pursuant to its powers to regulate interstate commerce, Congress may lawfully impose regulations on interstate air travel from Love Field; indeed, Congress could prohibit *all* interstate travel from Love Field. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-40 (1937) (Congress empowered to regulate broadly any activity that affects interstate commerce). *A fortiori*, the government can restrict air carriers from advertising the availability of "connecting flights" at points located within the Love Field service area in order to reduce the demand for interstate travel at Love Field. Petitioners cite no authority for the proposition that such clearly authorized restrictions should be subject to strict scrutiny. In contrast, this Court in *Posadas* found that Puerto Rico *could* lawfully have imposed a complete ban on casino gambling. Accordingly, the Court opined, it could do the lesser act of restricting the advertisement of casino gambling. *Posadas*, 478 U.S. at 345.

2. Carey *and* Bigelow *Are Inapposite*

Carey and *Bigelow* are both cases in which the conduct in question involved fundamental rights that could not have been curtailed by the State.[9] *Carey* involved the decision whether or not to beget a child—"That decision holds a particularly important place in the history of the right of privacy." *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977). *Bigelow v. Virginia*, 421 U.S. 809 (1975) involved the fundamental right of residents of Virginia to choose whether to have an abortion. The State attempted to prohibit the advertisement within Virginia of the availability of abortion facilities in a neighboring state.

IV. THE WRIGHT AMENDMENT DOES NOT VIOLATE OR EVEN IMPLICATE THE CONSTITUTIONAL RIGHT TO TRAVEL

The right to travel is not a right that is found in any express term of the Constitution. However, Petitioners argue that the seemingly omnipresent nature of the right to travel justifies the application to the Wright Amendment of "heightened scrutiny" that this Court has adopted for resolving constitutional issues that relate to infringements of express provisions of the Constitution involving fundamental rights or suspect classifications. The District Court properly rejected Petitioners' contention, holding that because the "Wright Amendment operates only as an inconsequential impediment to the right to travel and does not implicate the fundamental right [to travel]." application of a "compelling interest" or heightened scrutiny analysis is inappropriate. *State of Kansas*, 797 F. Supp. at 1051-52. (Pet. App. 34a.)

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[9] Contrary to Petitioners' contention, neither *Carey* nor *Bigelow* implicitly applies a level of scrutiny higher than that applied to ordinary commercial speech: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities which the State may legitimately regulate or prohibit." *Bigelow*, 421 U.S. at 825; *see also Carey*, 431 U.S. at 701.

The Court of Appeals was more emphatic: "In short, we think that the [Wright] Amendment's interference with interstate travel to and from Texas or, to and from the Dallas-Fort Worth area, or even air travel to and from Dallas alone is trivial." *State of Kansas*, 16 F.3d at 442. (Pet. App. 12a.)

A. The Wright Amendment Does Not Abridge the Fundamental Right of Interstate Travel

1. *Petitioners Do Not Have a Constitutional Right to the Most Convenient Form of Travel*

Petitioners do not have a constitutional right to the most convenient or the most economical form of travel. *State of Kansas*, 797 F. Supp. at 1051-52 (Pet. App. 34a-35a); *Cramer*, 931 F.2d at 1031; *City of Houston*, 679 F.2d at 1198 ("At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in *Shapiro* [*v. Thompson*, 394 U.S. 618 (1969)] or in the airlines' own schedules.").

2. *Minor Travel Inconveniences Do Not Violate or Implicate the Fundamental Right to Travel*

The Wright Amendment does not prohibit, prevent, or even deter travel from any geographical location to another; it merely ensures that most long haul travellers use DFW Airport and provides safeguards against circumvention of this legislative allocation of air travel services. Yet, Petitioners claim that their fundamental right of interstate travel is unconstitutionally abridged by the Wright Amendment because *if* Petitioners voluntarily choose Love Field (instead of DFW Airport) as their departure or arrival airport for long haul travel, the Wright Amendment imposes heavy burdens. However, even Petitioners admit that these "burdens" imposed by the Wright Amendment are "not . . . onerous." (Appellants' Brief before the Court of Appeals, at 32).

The Court of Appeals stated, quoting Justice O'Connor in *Attorney-General of New York v. Soto-Lopez*, 476 U.S. 898 (1986):

> "[S]omething more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied." 476 U.S. at 921. We think in this case that appellants' claim does not reach that threshold, and the impact of the Wright Amendment on interstate travel—even air travel to and from the Dallas-Fort Worth area—is negligible.

State of Kansas, 16 F.3d at 442. (Pet. App. 11a.)

B. The Wright Amendment Does Not Create Impermissible Classes: It Does Not Violate the Fifth Amendment's Due Process Clause

Petitioners wrongly urge that this Court should apply a heightened Fifth Amendment Due Process/Equal Protection analysis to the Wright Amendment. Heightened scrutiny under the Equal Protection Clause is required only in the rare circumstance "where a law classifies by race, alienage, or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights." *Attorney-General of New York*, 476 U.S. at 906-907, n.6. Clearly, the Wright Amendment makes no such classification.

The *Shapiro* case does not require compelling interest scrutiny of the Wright Amendment. Petitioners' citation from the opinion of Justice Stewart in that case (Pet. 25) is selective and inaccurate, suggesting that Justice Stewart intended his observations to apply to any statute that *in any way* impinges upon the constitutional right of interstate travel. What the learned Justice actually wrote was: "And it further follows, as the Court says, that any *other* purposes offered in support of a law *that so clearly impinges upon the constitutional right of interstate travel* must be shown to reflect a *compelling* governmental in-

terest." *Shapiro*, 394 U.S. at 643-644 (second emphasis added).

If Petitioners were correct, all perimeter rules which, like the Wright Amendment, restrict the ability of commercial passenger aircraft to travel directly to or from any point outside a certain area surrounding the restricted airport, would be unconstitutional. Of course, such perimeter restrictions have been upheld as constitutional on several occasions. *See. e.g., City of Houston*, 679 F.2d 1184 (5th Cir. 1982) (upholding the constitutionality of Washington National perimeter rule as not violative of either the fundamental right to travel or the Port Preference Clause). Although not analyzing whether the rule constituted a violation of the right to travel, the Second Circuit also upheld a perimeter rule for New York's La Guardia Airport despite the rule's requirement that passengers travelling a long distance use a less convenient airport. *Western Air Lines, Inc. v. Port Authority*, 817 F.2d 222 (2d Cir. 1987).

The Wright Amendment does not infringe fundamental rights, because Petitioners do not have a constitutional right to the most convenient form of travel. Compelling interest scrutiny under the Fifth Amendment's Due Process Clause is both unnecessary and improper; the Court of Appeals did not err in failing to require the National Government to demonstrate a compelling justification for the Wright Amendment.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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